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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF EDUCATION,
PETITIONER

v.

SEATTLE UNIVERSITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General
DREW S. DAYS, III
Assistant Attorney General
BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, authorize the Department of Education to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance.

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The Solicitor General, on behalf of the United States Department of Education, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 621 F.2d 992. The opinion of the district court (App. B, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1980 (App. D, *infra*). On September 8, 1980, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> **(1) Classes of educational institutions subject to prohibition**
>
> in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later:

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate

higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with

any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. The regulations of the Department of Education provide in pertinent part:[1]

[1] These regulations, at the time of the court of appeals decision, appeared at 45 C.F.R. 86.51(a)(1) and 86.54, respectively. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962, 30963 (1980); see note 2 *infra*.

34 C.F.R. 106.51(a)(1):

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

34 C.F.R. 106.54:

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

STATEMENT

Seattle University brought suit on September 1, 1977, to enjoin an investigation by the Department of Health, Education, and Welfare (HEW)[2] under regulations prohibiting sex discrimination in the employment practices of educational institutions operating federally

[2]The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. Since all of the relevant actions in this case were taken by HEW prior to the reorganization, it will be necessary to refer to that agency in addition to the Department of Education in this petition.

assisted education programs and activities (App. A, *infra*, 3a).

The University receives financial assistance in support of its educational programs and activities, and it is therefore subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX"), and to authorized regulations promulgated to effectuate those provisions by federal departments and agencies through which it receives such financial assistance (App. B, *infra*, 8a).

To implement Section 901(a) of Title IX, 20 U.S.C. 1681(a), which provides that, with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federal education aid recipients. 45 C.F.R. 86.51 *et seq.* (now codified at 34 C.F.R. 106.51 *et seq.*).

In June, 1975, HEW notified the University that it had received a complaint from certain faculty members in the University's School of Nursing alleging sex discrimination in the payment of salaries, in violation of Title IX. HEW initiated an investigation of the employment practices of the University focusing on a comparison between salaries paid to faculty in the nursing school and those paid to faculty members in other schools and departments. While the University initially supplied information in response to HEW's request, it refused to comply with a request made by

letter of May 19, 1977. In refusing, it relied on the decision of the district court in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), that HEW had no authority to issue employment regulations under Title IX. The instant suit followed seeking declaratory and injunctive relief against further action by HEW to investigate the sex discrimination complaint (App. A, *infra*, 3a).

2. On cross-motions for summary judgment, the district court ruled for the University, holding that the adoption and issuance by HEW of the regulations then contained in 45 C.F.R. 86.51-86.61 are in excess of the authority conferred upon the agency by Congress under Title IX (App. B, *infra*, 7a-18a). The court concluded that "[t]hough cast in broad terms" the prohibitory language of Section 901(a) of Title IX "addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs" (*id.* at 11a). In the court's view, only those employees for whom a federal grant is designed, e.g., faculty members who receive research grants, are within Title IX's antidiscrimination provisions (*ibid.*). The court buttressed its conclusions by noting that the coverage exclusions in Section 901(a) relate to student activity or enrollment; it reasoned that the most likely explanation for the absence of any exclusions for employment practices is that Congress never intended to include employment within the coverage of the statute (*id.* at 11a-12a). Further, the court concluded that the statute is "program specific," *i.e.*, that Section 901 and 902 encompass discrimination only in specific education programs and activities that

directly receive federal financial assistance (*id.* at 12a-13a). Regulation of employment practices generally would thus be unauthorized (*id.* at 14a-15a). Finally, while recognizing the possible validity of prohibiting employment discrimination that adversely affects students, the court concluded that that goal was the focus of neither the regulations themselves nor HEW's investigation in this case (*id.* at 16a-17a).

3. The court of appeals affirmed (App. A *infra*, 1a-6a), relying upon the decisions of the courts in *Romeo Community Schools* v. *HEW*, *supra*; *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); and *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979). It held that "neither the plain language of Title IX nor the legislative history support HEW's [employment coverage] contention" (App. A, *infra*, 4a). Concluding that the prior decisions had "thoroughly addressed" each of HEW's arguments, the court found it "unnecessary to add to their discussions" (App. A, *infra*, 5a-6a). The court also agreed that while the " 'infection theory' " might be valid, a " 'nexus between the discrimination against employees and its effect on students must first be shown' " (App. A, *infra*, 4a-5a, quoting *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 430).

REASONS FOR GRANTING THE PETITION

The courts of appeals are at present in conflict on the question whether the Department of Education is authorized to prohibit those receiving federal financial

assistance for education programs and activities from discriminating, on the basis of sex, against their employees. We sought review in this Court, in the absence of a conflict in the circuits, of three prior decisions invalidating the HEW-promulgated regulations (regulations now adopted by the Department of Education) because those decisions, which together applied to a substantial portion of the nation, severely disrupted the Title IX enforcement program. The Court denied our petitions for certiorari in those cases, with Justices Brennan and Marshall dissenting. *Romeo Community Schools* v. *HEW*, *supra*; *Islesboro School Committee* v. *Califano*, *supra*; *Junior College District of St. Louis* v. *Califano*, *supra*. Subsequently, in addition to the court below, two other courts of appeals have decided the issue.

In *North Haven Board of Education* v. *Hufstedler*, Nos. 79-6136, 79-6247, 79-7747 (July 24, 1980), petition for rehearing pending, the Second Circuit held that the employment regulations are valid under Title IX (App. C, *infra*, 19a-48a).[3] In *Dougherty County School System* v. *Harris*, 622 F.2d 735 (1980), the Fifth Circuit, while affirming a lower court decision invalidating the regulations as overbroad, concluded that the statute reaches "at least some employment practices" of federal aid recipients. 622 F.2d at 738. We submit that the decision of the Second Circuit correctly construes the language and legislative history of

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[3] We shall promptly inform this Court of any forthcoming action by the Second Circuit on the presently pending petition for rehearing and suggestion of rehearing *en banc* in *North Haven*.

Title IX and that the conflict among the circuits on the issue reinforces the need for resolution by this Court.[4]

1. Section 901(a) of Title IX, 20 U.S.C. 1681(a), provides that:

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

The statute expressly prohibits three types of discrimination against all persons, *i.e.*, no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally assisted education programs or activities. The decisions of the courts below unduly focus on only one of those prohibitions—nondiscrimination in the

[4] As we stated in our petition in *Harris* v. *Islesboro School Committee*, No. 79-200 (O.T. 1978), cert. denied, 444 U.S. 972 (1979), we have been advised that the Office for Civil Rights (now in the Department of Education) has instructed its regional offices to proceed only in those cases in which it can be shown either (1) that the principal purpose of the federal assistance in question is to provide employment or (2) that the allegedly discriminatory employment practice may have a discriminatory impact upon students or other direct beneficiaries of the federal assistance. The first category of cases would come within Section 901 as construed by the courts below; the court of appeals expressly left open the question whether the second category of cases is covered.

On August 27, 1980, the House of Representatives passed an amendment (Section 309) to the Departments of Labor, Health and Human Services and Education and Related Agencies Appropriation Act, 1981, H.R. 7998, forbidding use of appropriated funds to enforce the portions of the regulations that have been invalidated by the courts of appeals unless and until the conflict among the circuits has been resolved in favor of their validity. 126 Cong. Rec. (daily ed. Aug. 27, 1980) H8000 - H8001. The bill, with that amendment, is now pending in the Senate.

disbursement of federal benefits. The district court's conclusion that the language of the statute on its face "addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs" (App. B, *infra*, 11a)—"participants" and "beneficiaries" being defined by the court as students attending the educational institution or teachers directly receiving federally funded research grants—gives insufficient weight to the two other prohibitions of the statute.[5] Although interpreting the statute more narrowly than we believe is warranted, the Fifth Circuit in *Dougherty County School System* v. *Harris*, *supra*, recognized that the language protects not only students but "all who may be 'excluded from participation in, be denied the benefits of, or be *subjected to discrimination under*' education programs or activities receiving federal assistance." 622 F.2d at 737–738 (emphasis in original).[6]

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[5] Because the court of appeals merely adopted the reasoning of prior decisions on this issue, we will refer in this petition to the decision of the district court or to those of the other courts of appeals on which the court below relied.

[6] The *Dougherty County* court concluded, however, that Title IX regulations could not validly extend beyond those employees of a federal aid recipient who work in specific programs receiving federal financial assistance. We disagree with the Fifth Circuit's view that the specific purposes for which federal funds are used by an educational institution or system properly control the scope of regulations under Title IX or the Department of Education's authority to investigate possible employment discrimination in that institution or system's educational program. We do, however, acknowledge that the Department's fund-termination authority under Section 902 is limited to "the particular program or part thereof" in which discrimination or its effects are shown. See *North Haven Board of Education* v. *Hufstedler*, *supra* (App. C, *infra*, 47a–48a).

Employees of an educational institution are as susceptible of being "excluded from participation in" federally assisted programs or "subjected to discrimination under" such programs as are the students in those programs. For example, if the respondent university refused to hire teachers of one sex to teach in particular federally funded programs (regardless of the source of funding for the particular teacher's salary), such persons would "be subjected to discrimination under" those programs. The decisions below prevent HEW from taking steps to assure that such types of discrimination do not occur, even though they come within the plain language of the statute.

No language in any other part of Title IX states either expressly or by implication that employees who are subjected to discrimination on the basis of sex as defined in Section 901(a) are to be excluded from the coverage of the regulations authorized by Section 902. The fact, relied on by the district court (App. B, *infra*, 11a–12a), that none of the Section 901 exemptions addresses employment may more readily be taken to mean that no exemptions for employment discrimination were intended than that employment discrimination was not covered by Section 901. Indeed, as the court in *North Haven* noted (App. C, *infra*, 38a–41a), statements made by the Senate sponsor of Title IX indicate that employment coverage was assumed in drafting the exemptions. Exemptions for educational institutions controlled by a religious organization (Section 901(a)(3)) and for military schools (Section 901(a)(4)) were described as applying to employment practices. 118 Cong. Rec. 5813 (1972) (remarks of Senator Bayh). Thus construed, Section 901 in its entirety

simply reflects the intention of the Senate sponsor that, while there were exceptions to coverage in other areas, "[i]n the area of employment, we permit no exceptions * * *." 118 Cong. Rec. at 5812 (1972). As our discussion of the legislative history below indicates, a provision specifically prohibiting agencies from taking action with respect to any employment practice of a federal aid recipient unless a primary objective of the aid is to provide employment was proposed by the House of Representatives and deleted in the conference committee. Title IX as it emerged from that committee unambiguously prohibits sex discrimination against employees in education programs and activities receiving federal aid without regard to the primary objective of the aid, and it accordingly authorized HEW to issue and enforce regulations effectuating that prohibition.

3. In enacting Title IX of the Education Amendments of 1972, Congress intended to address comprehensively the "persistent patterns of discrimination against women in the academic world." 118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh). One of the specific targets of this legislation was discrimination against "those women who choose to make education their life work." *Id.* at 5804-5805. Senator Bayh, in introducing the amendment that became Title IX,[7] pointed to a number of areas in which women receive

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[7]The legislation introduced by Senator Bayh, designated "Amendment 874," was offered as an amendment to S. 659, a bill to amend the Higher Education Act of 1965 and other Acts concerned with education. 118 Cong. Rec. 5791, 5802-5803 (1972).

unequal treatment in employment by educational institutions: discrimination in hiring, fewer opportunities for advancement, preference for men in administrative positions, and denial of equal pay for equal work. *Id.* at 5805. The aim of Senator Bayh's amendment was "to expand some of [the] basic civil rights and labor laws to prohibit [this documented] discrimination against women." *Id.* at 5807.

Senator Bayh's amendment consisted of several distinct parts: the prohibition of sex discrimination and the related enforcement procedures which, with no changes here pertinent, appear in Sections 901 and 902 of Title IX, now codified at 20 U.S.C. 1681-1682; a provision amending a section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, so as to make Title VII applicable to employees of public educational institutions, who were originally excluded; and a provision amending the Equal Pay Act, 29 U.S.C. 213(a), so as to make it applicable to administrative, executive, and professional workers. 118 Cong. Rec. 5803, 5807 (1972).[8] The conclusion in *Romeo Community Schools* v. *HEW*, *supra*, 600 F.2d at 584-585, and *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 427-428—decisions relied on by the court below—that Senator Bayh's amendment dealt with employment discrimination only through the amend-

[8]Section 1009 of Senator Bayh's amendment, amending the Equal Pay Act, became Section 906(b)(1) of Title IX, Pub. L. No. 92-318, 86 Stat. 375. The amendment of Title VII of the Civil Rights Act of 1964 was ultimately deleted because, just before final passage, a similar amendment was enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. 2000e(a).

ments to Title VII and the Equal Pay Act is contradicted by the explanations given by Senator Bayh himself in introducing his amendment and in the ensuing debate.

Perhaps the clearest expression of the intent of the amendment came in the Senator's summary of what his amendment was designed to accomplish and how it would do this. *Id.* at 5806–5808. The Senator broke his summary down according to what he termed different "portion[s]" of the amendment. His explanations of the first two such portions appear in the Congressional Record under the headings "A. Prohibition of Sex Discrimination in Federally Funded Education Programs" and "B. Prohibition of Education-Related Employment Discrimination." *Id.* at 5807. In the first part of his summary he describes the basic prohibition against sex discrimination and the "enforcement provisions which generally parallel the provisions of title VI [of the Civil Rights Act of 1964]" (*ibid.*); and in the second part he describes the amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Despite the contrary inference that might be drawn from the headings alone, Senator Bayh's description of the first portion of his amendment shows that Section 901 of Title IX was intended to cover discrimination in employment practices by educational institutions receiving federal support for their programs.[9] Thus,

[9] Part "A" of the summary begins with the statement, "Central to my amendment are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. The reference to "sections 1001–1005" is evidently a misprint for "sections 1001–1004," since Section 1005 is the amendment to Title VII, which is not limited

after describing the mechanics of the amendment (the authority conferred on HEW to issue regulations, to permit certain types of "differential treatment" of students based on sex, and to penalize violations of regulations by fund termination), the Senator then defines the types of sex discrimination subject to these procedures (*ibid.*):

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth. The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

Because that description of the scope of the amendment is obviously part of a prepared statement rather than off-the-cuff remarks uttered in the heat of debate, it shows clearly that in the subsequent colloquy between Senator Bayh and Senator Pell concerning Section 1001(a) and (b) of Senator Bayh's amendment (the predecessors of 20 U.S.C. 1681(a) and (c), respec-

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to "federally funded education programs" and which, as noted, is discussed in Part B of the summary, along with the Equal Pay Act amendment. The error may reflect a confusion with the numbering of similar provisions in Title X of the original House bill, H.R. 7248, which included an extra section. H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 108 (1971); 117 Cong. Rec. 39098-39099 (1971). See the discussion in *North Haven* (App. C, *infra*, 37a n.11). The difference in numbering between Senator Bayh's amendment and the provisions ultimately enacted is attributable to the fact that Senator Bayh's amendment was originally planned as Title X of S. 659. 118 Cong. Rec. 5791, 5803 (1972).

tively), Senator Bayh means exactly what he says concerning the scope of Section 1001 (118 Cong. Rec. 5812):

> Mr. PELL. * * * Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded * * * their admissions practices. Does the same exclusion apply * * * at the elementary and secondary level?
>
> Mr. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

These remarks by Senator Bayh, together with his summary, quoted above, of the scope of the first "portion" of his amendment, cannot be dismissed—in the words of the court in *Islesboro*—as "occasional lapses" reflecting "the imprecision of oral discussion," 593 F.2d at 428. As the remarks of the sponsor of language ultimately enacted, they are an authoritative guide to its construction. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).[10]

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[10]The *Islesboro* court, commenting on a very brief summary Senator Bayh asked to have printed in the record (118 Cong.

Finally, the construction of Section 901 of Title IX to cover discrimination in employment practices is supported by the rejection by the conference committee of a provision excluding such practices from the types of discrimination for which the fund termination mechanism is an available sanction. The House version had included the following provision, parallel to Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-3 (117 Cong. Rec. 39365 (1971)):

> SEC. 904. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

The Conference Report notes, but gives no explanation for, the deletion of this provision (H.R. Rep. No. 92-1085, 92d Cong., 2d Sess. 221 (1972)). In view of the fact, however, that the counterpart in Title VI of the 1964 Act was added to give precise definition to the intended scope of the basic prohibition in Section 601 of that title, 42 U.S.C. 2000d (and therefore to foreclose courts from construing Section 601 to apply to employment discrimination other than the limited

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Rec. 5808 (1972)), concluded (593 F.2d at 428) that the section titles "Basic Prohibition," for what became Section 901 of Title IX, and "Employment Discrimination," for the section that would amend Title VII of the Civil Rights Act of 1964, indicated that Section 901 was not intended to cover employment discrimination. This is not a necessary inference, and, as we have demonstrated (page 15-17, *supra*), Senator Bayh's more extended description of this amendment shows it is an incorrect one. See *North Haven Board of Education* v. *Hufstedler*, *supra*, App. C, *infra*, 33a-37a; *Dougherty County School System* v. *Harris*, *supra*, 622 F.2d at 738.

category indicated in Section 604) (see 110 Cong. Rec. 12720 (1964) (remarks of Senator Humphrey)), it is reasonable to suppose that Congress intended to leave open for Section 901 of Title IX the interpretation it foreclosed in Title VI. As the court in *North Haven* correctly noted (App. C, *infra*, 42a):

> It is not enough * * * to say as * * * the other circuits have suggested that the deletion of this provision in conference was simply to avoid inconsistency with the other provisions of the bill proposing to amend Title VII and the Fair Labor Standards Act, since Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act.[11].

4. In construing Section 901 of Title IX as inapplicable to employment discrimination on the part of educational institutions that receive federal aid, the court below and the courts on whose decisions it has relied

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[11] Because the deleted language refers specifically to federal financial assistance, it would not, on its face, be applicable to the Title VII and Equal Pay Act amendments. A minor redrafting would thus have cured any inconsistency, *e.g.*, "[N]othing contained in this title shall be construed to authorize action under *sections 901 and 902* * * * with respect to any employment practice."

An amendment proposing language to the same effect was introduced in 1975 by an opponent of employment coverage, but it was never reported out of committee. S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23845-23847 (1975). An amendment limiting the coverage of Section 901 to the "curriculum or graduation requirements" of federally assisted institutions, introduced in 1976 (122 Cong. Rec. 28136 (1976)), was opposed by Senator Bayh, in part because it would exempt "employment" and other "areas of traditional discrimination." *Id.* at 28144. The amendment was defeated. *Id.* at 28147-28148.

have, as shown, glossed over plain language of the statute and misread clear indications of congressional intent in its legislative history. They have also ignored two fundamental guides to the construction of statutes and administrative regulations.

The first is that the contemporaneous construction of a statute by an agency "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" will not be overturned except for "very cogent reasons." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). This Court has held that such a construction should normally be accorded substantial deference. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

In the present case, HEW has, pursuant to statutory command (20 U.S.C. 1682), issued regulations to effectuate its understanding of the purpose of Section 901 of Title IX, 20 U.S.C. 1681; its regulations have been approved by the President; and they have lain before Congress without a vote of disapproval. It is true that the failure of Congress to disapprove the regulations may not be construed as congressional approval (see 20 U.S.C. 1232(d)(1)). Nevertheless, it is not insignificant that since the time that HEW published its regulations for comment, including the employment practices regulations at issue here (39 Fed. Reg. 22228, 22236-22238 (1974)), Congress has twice amended 20 U.S.C. 1681 without adding any provision that would invalidate the employment practices regu-

lations (88 Stat. 1862 (1974); 90 Stat. 2234 (1976)); and the second of those amendments was passed after the regulations had been issued in final form (40 Fed. Reg. 24128, 24143-24144 (1975)) and reviewed by Congress (*Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975)). See the discussion in *North Haven* (App. C, *infra*, 42a-44a). As this Court has recently observed, while it is "not always * * * realistic to infer approval of a judicial or administrati[ve] interpretation from congressional silence alone," an agency's construction of a statute has considerable force if it has been brought to the attention of Congress and Congress has "not sought to alter that interpretation although it has amended the statute in other respects * * *." *United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

The decision below also conflicts with the principle that remedial civil rights legislation should be broadly interpreted in order to effectuate its purposes. *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). The fact that employment coverage under Section 901 of Title IX overlaps the coverage of other legislation aimed at eliminating sex discrimination in employment does not nullify this general principle of construction. Although the courts may disagree with Congress' choice to disperse among several statutes and agencies the authority to combat such discrimination, they are not free to disregard and frustrate that plan as they have done here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General
DREW S. DAYS, III
Assistant Attorney General
BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys

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